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BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Order Instituting Rulemaking to Consider Adoption of a General Order and Procedures to Implement the Digital Infrastructure and Video Competition Act of 2006	R.06-10-005

APPLICATION FOR REHEARING OF D.07-10-013 BY THE UTILITY REFORM NETWORK

November 5, 2007

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APPLICATION FOR REHEARING OF D.07-10-013 BY THE UTILITY REFORM NETWORK

Pursuant to Rule 16.1 of the Commission's Rules of Practice and Procedure, The Utility Reform Network ("TURN") files this Application for Rehearing of Decision ("D.") 07-10-013 in the above-referenced docket. This application for rehearing is timely filed. The Decision was issued on October 5, 2007, and the 30 day deadline falls on November 5, 2007.

On March 1, 2007, the Commission issued D.07-03-014 to implement the Digital Infrastructure and Video Competition Act of 2006 ("DIVCA"). In that DIVCA Phase 1 decision, the Commission held, *inter alia*, that DIVCA precluded the Commission from awarding intervenor compensation to parties participating in DIVCA-related proceedings. On April 4, 2007 TURN filed an Application for Rehearing of D.07-03-014. That Application is pending. As part of its Application for Rehearing, TURN asserted that the Commission committed legal error by holding that the Commission lacks statutory

authority to grant intervenor compensation "in the video context."[1] On May 4, 2007, TURN submitted a request for intervenor compensation for our substantial contributions to the Commission Decision ("D.") 07-03-014, the Commission's decision in Phase I of this proceeding.

On October 5, 2007, the Commission issued D. 07-10-013 – the decision in Phase 2 of this proceeding. In that decision, relying entirely on its prior decision in Phase 1, the Commission rejected TURN's request for intervenor compensation,:

> Ordering Paragraph 25 of D.07-03-014 states: "No party shall be awarded intervenor compensation in a proceeding arising under DIVCA." This DIVCA rulemaking itself falls within the broad ambit of the holding in Ordering Paragraph 25. Therefore, the pending NOIs and TURN's request for compensation should also be rejected.[2]

The Commission went on to order:

> The notices of intent filed in Phase I of this Rulemaking 06-10-005 by Latino Issues Forum and Consumer Federation of California, and the request of The Utility Reform Network for an award of compensation for substantial contribution to Decision 07-03-014 are denied.[3]

Given that the Commission relied exclusively on the challenged outcome D.07-03-014 (Phase 1) to now reject TURN's request for intervenor compensation, TURN reiterates both its objections and arguments made in our Application for Rehearing of D. 07-03-014 relating to the Commission's denial of any opportunity for intervenors to receive compensation in this proceeding. The arguments we made in the Application for Rehearing of D. 07-03-014 regarding the Commission's legal error are equally applicable

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[1] See TURN's Application for Rehearing of D.07-03-014 (April 4, 2007), pp. 17-23.

[2] D.07-10-013, Conclusion of Law ("COL") 10; also see footnote 39.

[3] D.07-10-013, Ordering Paragraph ("OP") 3.

to the decision in Phase 2 D. 07-10-013 and we incorporate them by reference. For convenience, TURN's Application for Rehearing of D. 07-10-013 is attached.

For the reasons stated above and in the Application for Rehearing of D.07-10-013, TURN requests its application for rehearing be granted.

November 5, 2007

Respectfully submitted,

_____/S/_____

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BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Order Instituting Rulemaking to Consider Adoption of a General Order and Procedures to Implement the Digital Infrastructure and Video Competition Act of 2006	R.06-10-005

APPLICATION OF THE UTILITY REFORM NETWORK FOR REHEARING OF DECISION 07-03-014

April 4, 2007

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BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Order Instituting Rulemaking to Consider Adoption of a General Order and Procedures to Implement the Digital Infrastructure and Video Competition Act of 2006	R.06-10-005

APPLICATION OF THE UTILITY REFORM NETWORK FOR REHEARING OF DECISION 07-03-014

Pursuant to the Rule 16.1 of the Commission's Rules of Practice and Procedure, The Utility Reform Network ("TURN") files this Application for Rehearing of Decision ("D.") 07-03-014 in the above-referenced docket. This application for rehearing is timely filed. The Decision was mailed on March 3, 2007, and the 30 day deadline falls on April 4, 2007.

I. INTRODUCTION

In our various pleading filed in this proceeding, TURN has expressed numerous concerns about the Commission's interpretations of the Digital Infrastructure and Video Competition Act of 2006 ("DIVCA"). While those concerns remain, the instant application for rehearing focuses on the following instances of legal error in D.07-03-014:

- The Decision's failure to provide any monitoring and enforcement to ensure no cross-subsidization of video infrastructure from basic residential telephone rates represents a dereliction of the Commission's regulatory responsibilities and a failure to implement specific requirements of DIVCA and therefore the Commission has not proceeded in the manner required by law.
- The Decision's denial of any opportunity for interested parties to protest franchise applications is inconsistent with DIVCA as well as long-accepted Commission rules and thus is an error of law.
- The Decision commits legal error in determining that the Commission lacks statutory authority to grant intervenor compensation "in the video context."

II. THE DECISION'S FAILURE TO ORDER ANY PROCESSES TO ENSURE NO CROSS-SUBSIDZATION REPRESENTS A DERELICTION OF THE COMMISSION'S REGULATORY RESPONSIBILITIES AND A FAILURE TO IMPLEMENT THE SPECIFIC REQUIREMENTS OF DIVCA

In creating DIVCA, the California Legislature clearly articulated its concerns that any new video enterprises owned by the incumbent local telephone carriers ("ILECs") not be built on the backs of residential basic telephone service ratepayers. Thus, Public Utility Code ("P.U. Code") § 5940 specifically prohibits providers of video services who also provide stand-alone basic telephone services from increasing the telephone rates to finance the cost of deploying the video service. Furthermore, § 5950 freezes stand-alone basic residential exchange rates until January, 2009.

In D.07-03-014, the Commission assumes that because basic rates are frozen for two years no cross-subsidization can possibly occur over the ten year life of a video franchise. The Commission further assumes that,

> …even after January 1, 2009, stand-alone, residential, primary line, basic telephone service remains subject to tariff restrictions. It will be relatively easy to review any changes to rates of stand-alone, residential, primary line basic telephone service, either prospectively or retrospectively, to ensure that the increase is not used to finance video deployment.[1]

Both of these assumptions are not only unsupported by any evidence but are also incorrect. The two sections of DIVCA at issue are not so fungible that complying with one necessarily achieves compliance with the other, as the Commission essentially holds in D. 07-03-014. Thus, contrary to the Decision, the freeze of basic rates until January, 2009 provided in § 5950 does not effectively deal with the additional prohibition of cross-subsidization provided in § 5940. Therefore, the Commission has not proceeded in the manner required by law and its decision is not supported by the evidence and represents an abuse of discretion.

Currently the Commission has no system for collecting any cost data or pricing information on basic telephone service or, for that matter, on the costs of deployment of infrastructure required to offer video services. In other words, the Commission has none of the data that would be necessary to make an informed determination of the purpose for which revenues collected from a change in basic telephone service rates are being used. Thus, with all due respect to the capabilities of the Commission, it is extremely difficult to see how "relatively easy" it will be to "review changes to rates of stand-alone, residential, primary line basic telephone service, either prospectively or retrospectively, to ensure that the increase is not used to finance video deployment." How exactly will the Commission know that the costs of video deployment have not been subsidized by basic rates? The Commission's answer to this question is essentially that "current measures

[1] D. 07-13-014, p. 189 (emphasis added).

imposed by both the federal and state government, obviate the need for additional rules…"[2] But such measures do not address the task assigned to the Commission in §5940.

For example, the Commission cites P.U. Code § 709.2 for the proposition that the Commission has an adequate process to ferret out illegal cross-subsidization in the video context. As the Commission admits, this code section was adopted by the Legislature to ensure that the opening of the California intrastate interexchange telecommunications market was done in a way to ensure fair competition. Thus, § 709.2 required that the Commission, prior to authorizing intrastate interexchange telecommunications competition determine, among other things, "that there is no improper cross-subsidization of intrastate interexchange telecommunications service by requiring separate accounting records to allocate costs for the provision of intrastate interexchange telecommunications service and examining the methodology of allocating those costs." This requirement, adopted in 1994, did not envision the telephone companies providing video services and it is not at all apparent that the cost allocation and separate accounting requirement of § 709.2 would apply to the provision of such services. Furthermore, given the Commission's and the carriers' current perspective under URF that any "asymmetric" regulatory requirements shall be eliminated, there is substantial risk that the cost allocation and accounting requirements will disappear as another "asymmetric" requirement. The Commission cannot rely on a cost allocation scheme that may be inapplicable on its face and would be fundamentally opposed by both the Commission and the carriers as a vehicle for satisfying §5940.

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[2] D.07-13-014, p. 187.

The Commission also relies on P.U. Code § 495.7 that requires tariffing of basic residential rates. The Commission argues that,

> Tariffing entails special Commission reviews, which give us the opportunity to reject or suspend any price increases that lead to unlawful cross-subsidization…The Commission need only reject the advice letter if it determines a proposed rate increase will result in unlawful cross-subsidization. Alternatively, if need be, the Commission may rescind any non-complying tariff that goes into effect.[3]

While it is correct that for the foreseeable future it appears that basic rates will be tariffed and the Commission can review changes in these tariffs, there is nothing intrinsic to tariff reviews to enable the Commission or affected parties to uncover cross-subsidization. All the tariff reviews will examine (if anything), relating to rates, is whether the charge for a particular service or service element has increased and whether such increase is reasonable. There is nothing in the existing process that will also reveal whether any rate has been increased "to finance the cost of deploying a network to provide video service."[4] As discussed above, if the Commission has no cost data, and does not even track the prices of basic service, then it is simply not possible that a tariff review would allow the Commission to ensure that video deployment has not been financed by increases in basic rates. Perhaps if the Commission provided that any price increases in basic rates were presumptively related to cross-subsidizing video services, tariff reviews would be beneficial. But instead, it appears that the Commission's presumption is that "Federal and state provisions already make it extremely difficult to transfer funds from a regulated utility to unregulated operations."[5]

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[3] D.07-13-014, p. 188 (footnote omitted).
[4] P.U. Code § 5940.
[5] D.07-03-014, p. 224.

Further, the Commission intimates that since previous audits of affiliate transactions relating to § 709.2 found no cross-subsidization, then none would occur with regard to video services. These conclusions are entirely unjustified on the record before the Commission in this proceeding. In fact, during the last NRF reviews both AT&T (then Pacific Bell) and Verizon were found to have made improper affiliate transactions that were only discovered as a result of the audits performed on these companies. While the Commission ultimately ruled that the errors were not "material" (primarily because the amounts would not affect the rates to be paid by consumers), nonetheless the Commission found that the affiliate transactions rules had been violated.[6] And, at least in the Pacific Bell (AT&T) case, the Administrative Law Judge's Proposed Decision ordered further auditing of affiliate transactions.[7] There was no evidence presented in the instant proceeding to demonstrate any correlation between past affiliate transactions audits and what may or may not occur with respect to video services. Furthermore, the Commission's conclusion about how difficult it is for a carrier "to transfer funds from a regulated utility to unregulated operations" is totally unsubstantiated, and also does not provide sufficient justification for the Commission to not take further action to discharge the responsibility placed upon it by DIVCA.

The Commission also relies on its ability to open a "formal investigation into alleged illegal cross-subsidization" and the ability of local governments or individual

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[6] In D.04-09-061(Pacific Bell NRF Phase 2), the Commission found, in addition to other adjustments for incorrect affiliate transactions accounting, that "Pacific conceded 13 of Overland's affiliate transaction related adjustments, and we thereby adopt them. Moreover, in light of the audit findings, Pacific acknowledges that it should improve some existing internal controls, related to classification of costs among its FCC Part 32 accounts; retention of certain data to support allocations to Pacific; and revision to certain portions of the SBC Operations cost apportionment methodology." (p. 65).

[7] See Proposed Decision of ALJ Thomas in R.01-09-001, 8/29/03, p. 102.

consumers, among others, [to] bring cross-subsidization complaints to the Commission."[8] While these are all well and good, the same problems exist as discussed above – the Commission has chosen to go forward in a manner that ensures it will have no data to examine when it comes to determining whether an investigation or complaint is merited.

The Commission also relies upon Federal safeguards to protect against cross-subsidization, principally the FCC's Part 64 "separation" regulations. But the same carriers that are seeking and obtaining statewide video franchises under DIVCA are busily at work at the FCC seeking elimination of the very federal protections this Commission claims to rely upon. For example, the FCC is currently considering a petition for forbearance of FCC cost assignment rules originally filed by Bell South and subsequently refiled by AT&T after AT&T consumed Bell South. In the AT&T petition, the carrier is asking the FCC forbearance from the following rules:

> Parts 32.23 (Nonregulated activities), 32.27 (Transactions with affiliates); 64 Subpart I (referred to as "cost allocation rules"); Part 36 (referred to as "jurisdictional separations rules"); Part 69, Subparts D and E (referred to as "cost apportionment rules"); and other related rules that are derivative of, or dependent on, the foregoing rules. The petition also seeks limited forbearance from section 220(a)(2) of the Act to the extent this provision contemplates separate accounting of nonregulated costs.[9]

The AT&T petition has been supported by Verizon and, if granted, would represent a further weakening of the ability of regulators to examine cost allocation and whether cross-subsidization is occurring. Thus, Commission reliance on FCC processes is misplaced.

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[8] D.07-13-014, p. 189 (footnotes omitted).

[9] FCC Public Notice DA 05-3185, Dec. 22, 2005, Bell South Telecommunications, Inc. Petition for Forbearance From the Commission's Cost Assignment Rules, Pleading Cycle Established, WC Docket No.05-342, p. 1.

The Commission's failure to implement any processes to monitor and assess cross-subsidization under DIVCA stands in stark contrast to the efforts the Commission says it will undertake with respect to enforcing the DIVCA build-out and anti-discrimination requirements. In D.07-03-014, the Commission held that it

> … will undertake significant monitoring for enforcement of the antidiscrimination and build-out requirements. Although the Commission will provide public reports regarding video and broadband services "on an aggregated basis," each state video franchise holder will report to the Commission the data underlying the public reports at a high level of disaggregation. On a confidential basis, the Commission's staff will study this disaggregated data closely, in order to determine and track the progress that each state video franchise holder is making towards fulfilling its build-out requirements[10].

Mandatory, detailed reporting followed by close examination of the data and tracking and monitoring is the correct approach to enforce the DIVCA build-out and anti-discrimination requirements; absent such steps, the Commission will simply lack the tools to engage in any meaningful enforcement of those provisions. Yet, with regard to cross-subsidization, an issue that the Legislature deemed as important as the antidiscrimination and build-out requirements (as evidenced by its inclusion in DIVCA), the Decision takes a contrary and, as a result, inadequate approach. Rather than collecting highly detailed and disaggregated data and closely examining it, the Decision relies primarily on existing "measures" which TURN has demonstrated are insufficient and inconsistent with the mandates of DIVCA.

[10] D.07-03-014, p. 179 (footnote omitted).

III. THE DECISION'S DENIAL OF ANY OPPORTUNITY FOR INTERESTED PARTIES TO PROTEST FRANCHISE APPLICATIONS IS INCONSISTENT WITH DIVCA AS WELL AS LONG-ACCEPTED COMMISSION AND THUS IS AN ERROR OF LAW

In implementing DIVCA, the Commission appears to believe that it has been given the authority to eliminate all participation by interested parties in the video franchising process. By forbidding protests and disallowing any opportunity for intervenor compensation (discussed in more detail in Section IV below), the Commission has effectively excluded the public from any form of meaningful involvement in issues that directly affect them. This is legal error; California laws as well as Commission rules have historically encouraged intervenor participation in Commission proceedings.[11] If eliminating public participation is not the intent of the Commission in D.07-03-014, then it is incumbent upon the Commission to explain exactly what forms of participation are left to intervenors in the video franchising process.

In R.07-03-014, the Commission held that,

> The plain language of DIVCA does not afford the Commission discretion in its review of state video franchise applications. As such, there is no role for protests in our review of applications. A protest here "would be an idle act" that "could accomplish nothing." This interpretation is further supported by the short statutory review period and the Legislature's explicit lack of provisions for protests.[12]

The Commission's decision to not permit protests of video franchise applications rests primarily on its interpretation of the language of DIVCA. The Commission argues that Public Utilities Code § 5840 does not specifically provide for protests even as it

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[11] See, for example, Joint Commissioner and Administrative Law Judge's Ruling Affirming Denial of Eligibility in R.06-05-028, 1/29/07, p. 3, citing Re Commission's Intervenor Compensation program, 79 CPUC 2d 628 (D98-04-059).

[12] D.07-03-014, p. 93 (footnote omitted).

"strictly constrains" the Commission's review authority "to the task of determining whether the application is complete", and that the Commission has "no discretion over the substance or timing of our review of applications." [13] Finally, D.07-03-014 argues that given the strict timetable for review and approval of applications, there would be no time for a protest process.

The Commission is correct in its statement that DIVCA does not specifically authorize protests. However, more importantly, DIVCA does not forbid protests (nor does it suggest any interest in eliminating vehicles for public input to the application review and approval process). Given the amount of detail the Legislature provided in § 5840, it would be logical that if the Legislature did not want protests they could have easily prohibited them. Yet, they did not do so. To the contrary, the Legislature went out of its way to provide in § 5810(a)(2)(G) that one of the principles underlying the legislation was to "Maintain all existing authority of the California Public Utilities Commission as established in state and federal statutes." Further, the Legislature provided in DIVCA that the public interest is best served when the Commission can "thoroughly examine the issues before it, and …can take timely and well-considered action on matters before it" and when "full compliance" with the requirements of the statute is ensured.[14] Thus, unless specifically rejected in DIVCA, the Commission continues to have the authority to continue permitting many if not all the typical processes available in Commission proceedings. Certainly there might need to be accommodations to those processes to meet specific statutory parameters (e.g., a truncated protest process that is consistent with the timetable set forth in § 5840 for

[13] D.07-03-014, p. 93 (footnotes omitted).
[14] P.U. Code § 5810(3) and § 401(a).

reviewing applications). But nothing in the statute suggests any intent to eliminate any existing process enabling public input. It is only through an open process that permits the participation of all interested parties can the Commission truly examine all the issues and make fair decisions that comport with DIVCA as well as the Commission's responsibilities under the Public Utilities Code.

The opportunity for intervenor participation is particularly important in the video franchise application process. While it is accurate that § 5840 provides that "If the Commission finds that the application is complete, it shall issue a state franchise before the 14th calendar day after that filing,"[15] that section also provides that the Commission can find the application "incomplete" and permit the applicant to "cure the deficiency" and that the Commission then has 30 more days to review the amended application.[16] Among the issues the Commission is authorized to review are the "video service area footprint that is proposed to be served,"[17] and the applicant's "financial, legal and technical qualifications necessary to construct and operate the proposed system."[18] In addition, the Legislature mandated that the new video franchising process should adhere to certain principle, including promoting "the widespread access to the most technologically advanced cable and video services to all California communities," and complementing "efforts to increase investment in broadband infrastructure and close the digital divide."[19] The Commission cannot meet the requirements mandated by the Legislature using a purely ministerial process. According to D.07-03-014, the

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[15] P.U. Code § 5840(h)(2).
[16] P.U. Code § 5840(h)(3).
[17] P.U. Code § 5840(e)(1)(D)(6).
[18] P.U. Code § 5840(e)(9).
[19] P.U. Code § 5810(a)(2)(B) and (E)..

Commission's role is nothing more than making sure the boxes are checked on the application. Such an approach would be completely inconsistent with the fundamental purposes of DIVCA, in that it would permit the Commission grant applications without assuring that an applicant has a reasonable plan to meet the statutory objectives including the anti-discrimination requirements. Permitting interested parties a modicum of involvement and participation would ensure that franchise applications receive the level of review consistent with both the significant rights and responsibilities to be granted franchisees by DIVCA.

The Commission finds justification for its position in California court cases on statutory interpretation, stating,

> California courts more generally have recognized that "[w]here a statute or ordinance clearly defines the specific duties or course of conduct that a governing body must take, that course of conduct becomes mandatory and eliminates any element of discretion." Here the statute at issue, DIVCA, "clearly defines the specific duties or course of conduct a governing body must take." DIVCA states that the Commission "shall" issue a state video franchise if an application is complete, and California courts have confirmed that "[t]he word 'shall' indicates a mandatory or ministerial duty." Thus, we find that there is no room for discretion, and as a result, no process or time for protests.[20]

The Commission appears to hang its hat on the word "shall." And if the statute said "the Commission shall not permit protests on such applications," the logic stated in D.07-03-014 might hold true. But in light of the stated purposes and objectives of DIVCA, which are broader than the limited view the Commission adopts to claim a purely ministerial task, the interpretation question is not quite so simple. In such circumstances California courts consider a number of factors:

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[20] D.07-03-014, pp. 94-95 citing Rodriguez v. Solis, 1 Cal.App.4th 495, 504-505 (1991) (citing Great Western Sav. & Loan Assn. v. City of Los Angeles, 31 Cal.App.3d 403, 413 (1973)) and Lazan v. County of Riverside, 140 Cal.App.4th 453, 460 (2006).

> In interpreting a statute, we apply the usual rules of statutory construction. "We begin with the fundamental rule that our primary task is to determine the lawmakers' intent. [Citation.] . . . To determine intent. ' "The court turns first to the words themselves for the answer." ' [Citations.] 'If the language is clear and unambiguous there is no need for construction, nor is it necessary to resort to indicia of the intent of the Legislature (in the case of a statute) . . . .' " [Citation.] We give the language of the statute its "usual, ordinary import and accord significance, if possible, to every word, phrase and sentence in pursuance of the legislative purpose. A construction making some words surplusage is to be avoided. The words of the statute must be construed in context, keeping in mind the statutory purpose . . . . Both the legislative history of the statute and the wider historical circumstances of its enactment may be considered in ascertaining the legislative intent." ' [Citation.]" (Shewry v. Arnold (2004) 125 Cal.App.4th 186, 193.).[21]

While DIVCA requires that the Commission "shall" issue video franchises, the Commission must do so within the context of the legislation and cannot just issue a franchise to any applicant who fills out the paper work. Thus, when the words of § 5840 are considered within the context of the purposes and objectives of DIVCA, as well as within the context of the types of requirements ordered for applicants to supply the Commission, it is clear that the Commission has some discretion and also has the authority to permit protests.[22] The Commission can fulfill the statutory requirement that it "shall" issue franchises and still permit protests; indeed, doing so would give effect to a broader range of the purposes and intent fundamental to DIVCA.

Finally, the Commission argues that even if it had the power to authorize protests, "It would not be feasible to entertain protests, responses to protests, and Commission action to resolve the protests during the short period set by DIVCA for the review of a

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[21] *Blumhorst v .Jewish Family Services of Los Angeles*, 126 Cal. App. 4th 993, *1000; 24 Cal. Rptr. 3d 474, **479; 2005 Cal. App. LEXIS 223, ***11, pp. ***13-14 (emphasis added).

[22] D.07-03-014 also cites legislative history for the proposition that the application process is intended to be ministerial (D.07-03-014, fn. 815). However, as the Decision indicates, the legislative history specifically stated that "the state franchising process is intended to be largely ministerial" (emphasis added), a tacit admission that the Commission goes beyond the statute when it embraces a totally ministerial process.

state video franchise application."[23] While it is true that a protest process would be challenging within the time frames prescribed by DIVCA, it would hardly be as impossible as the Commission finds. Over the past few years there have been many proceedings that the Commission has completed in record time when the Commission and the industry desire quick turn-around[24] so the Commission's protestations ring hollow. Furthermore, under P. U. Code § 311 (g), pertaining to Commission decisions, the Commission may reduce the 30 day period for public review and comment on proposed decisions and specifically provides that,

> Consistent with regulatory efficiency and the need for adequate prior notice and comment on commission decisions, the commission may adopt rules, after notice and comment, establishing additional categories of decisions subject to waiver or reduction of the time period in this section.[25]

Thus, there is nothing standing in the Commission's way of implementing a truncated protest process. Even under the strict timetable required in DIVCA, a substantive protest could easily be submitted under a standard 20 day time frame (or even a 10 or 15 days) from the appearance in the Daily Calendar (as it is for Advice Letters) , and still allow the Commission 10 additional days to review the protest and determine whether the application is incomplete based on Commission staff review or the protests

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[23] D.07-03-014, FOF 78.

[24] For example, in D.07-01-041, the Commission conducted an expedited hearing process for SoCal Edison's authorization to enter into a power purchase contract; in the natural gas context, the Commission still utilizes an expedited application process first established in 1992 (in D.92-11-052) for the utilities to seek approval of discounted gas transportation contracts to prevent loss of customers to non-CPUC regulated competitors. The Commission has also recently "fast-tracked" several significant telecommunications proceedings, e.g., the mergers of SBC and AT&T (D.05-11-028), and Verizon and MCI (D.05-11-029); the URF Decision (D.06-08-030); and the instant proceeding resulting in D.07-03-014. While none of these examples are as short as what would be required if protests of video franchise applications were permitted, they do demonstrate that if the Commission did permit protests a reasonable expedited process could be utilized.

[25] P.U. Code § 311(g)(3).

received. Once an application is deemed incomplete, the applicant has the duty to revise and supplement the application starting the 30 day clock again. Arguably, the Commission could further shorten these time periods to allow a reasonably fair process which is far superior to absolutely no public process.

Under the cover of a dubious interpretation of DIVCA, the Commission has effectively silenced all consumer voices that may have been heard in considering the grant of video franchises. This is not only a misapplication of DIVCA since the Legislature never said "there shall be no protests," but also turns years of Commission practice on its head. It has been a long-standing Commission practice to permit interested parties exercise their due process rights by protesting applications. The Commission's new approach violates this fundamental right and should be reversed.

IV. THE DECISION COMMITS LEGAL ERROR IN DETERMINING THAT THE COMMISSION LACKS STATUTORY AUTHORITY TO GRANT INTERVENOR COMPENSATION "IN THE VIDEO SERVICES CONTEXT"

The intervenor compensation statutes aim to ensure that financially eligible intervenors have the means to participate in Commission proceedings. To achieve this goal, the Legislature imposed only three requirements – compliance with the notice and filing requirements set forth in Section 1804, and demonstration of a "financial hardship" and "substantial contribution," the two standards set forth in Section 1803. Neither Section 1803 nor Section 1804 uses the word "utility." Instead, these provisions refer to Commission proceedings. A video service franchise application creates such a "proceeding." Yet in D.07-03-014 the Commission determined that intervenor

compensation would not be permitted under any circumstances in these proceedings. In doing so, the Commission has hindered public participation in such proceedings. This result is legal error, as it is inconsistent with DIVCA, inconsistent with the intervenor compensation statutes, and inconsistent with sound public policy.

The Commission's principle rationale for rejecting the possible grant of intervenor compensation is:

- That the intervenor compensation statutes "limit the intervenor compensation program to proceedings involving utilities;"[26]
- That DIVCA states that video franchisees are not public utilities; and
- That DIVCA states that the Commission may not "impose [a] requirement on state franchise holders other than one 'expressly provided' in the Act."[27]

Thus, *ipso facto,* intervenor compensation is unavailable.

In addition, the Commission adopts the argument, made by Verizon, that "state video franchise holders that also are telephone companies should not be subject to intervenor compensation obligations if other state video franchise holders are not subject to the same requirements."[28]

§ 1801 of the intervenor compensation statutes clearly provides that the article's purpose is "to provide compensation for [fees and costs] to public utility customers of participation or intervention in <u>any</u> proceeding of the commission." [emphasis added] Further, § 1803 is mandatory: "The commission <u>shall</u> award [reasonable fees and costs] of preparation for and participation in a hearing or proceeding" if the customer complies with Section 1804, demonstrates a substantial contribution to the Commission's order or decision, and meets the "significant financial hardship" standard. [emphasis added] §

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[26] D.07-03-014, p. 208.
[27] D.07-03-014, p. 209.
[28] D.07-03-014, p. 210.

1802(f) defines "proceeding" in a manner that refers only to the matter being the subject of a formal proceeding before the Commission, without any mention of whether the subject of that proceeding is a public utility for purposes of the statute.[29] Thus, the statutory language most relevant to eligibility focuses on whether the Commission is engaged in a formal proceeding, rather than whether a regulated utility is involved in the proceeding, contrary to the Decision.[30]

The Decision relies principally on the argument that provisions in the intervenor compensation statutes state that

> …the intervenor compensation program "shall apply to all formal proceedings of the commission involving electric, gas, water, and telephone utilities" to encourage participation of those with "a stake in the public utility regulation process," and that intervenor compensation awards are to be paid by "the public utility which is the subject of the . . . proceeding. . . ." It is inappropriate for the Commission to extend the statutory intervenor compensation program given the Legislature's express delineation of its scope.[31]

These arguments ignore some fundamental points. First, § 1801.3 is not exclusionary – it does not say "only" proceedings applying to public utilities. This combined with the mandatory language that the Commission "shall award" fees and costs for participation in "any" proceeding demonstrates a broader intent on the part of the Legislature than the narrow reading of D.07-03-014. The Commission has argued with respect to denying the opportunity for parties to protest franchise applications, that

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[29] The Commission has awarded intervenor compensation to public utility customers for their work in proceedings where public utility service was not directly at issue, such as the rulemaking on intervenor compensation (D.00-02-044, issued in R.97-01-009/I.97-01-010) and the rulemaking on revising General Order 96 (D.05-05-007, issued in R.98-07-038). It has also awarded intervenor compensation for work in a "proceeding" that did not involve any "public utility." (See D.02-05-029, where the Commission awarded intervenor compensation for work in a case involving mobile home parks.)

[30] "… we find that these statutes limit the intervenor compensation program to proceedings <u>involving utilities</u>." D.07-03-014, p. 208 [emphasis added].

[31] D.07-03-014, p. 227, citing P.U. Code §§ 1801.3 and 1807.

> California courts more generally have recognized that "[w]here a statute or ordinance clearly defines the specific duties or course of conduct that a governing body must take, that course of conduct becomes mandatory and eliminates any element of discretion." Here the statute at issue, DIVCA, "clearly defines the specific duties or course of conduct a governing body must take." DIVCA states that the Commission "shall" issue a state video franchise if an application is complete, and California courts have confirmed that "[t]he word 'shall' indicates a mandatory or ministerial duty."[32]

Just like the language in DIVCA, the intervenor compensation statutes clearly define and state the Commission's course of conduct – it "shall award" intervenor compensation in "any" proceeding where the party has met the statutory qualifications. And, according to the Commission's own logic, the word "shall" "indicates a mandatory duty. Thus, in the instance of intervenor compensation, the Commission's statutory interpretation is to negate the Legislature's fundamental objective "to encourage the effective and efficient participation of all groups that have a stake in the public utility regulation process,"[33] and make an affirmative obligation into a "shall not."

The Commission also tries to find support for its position in the language of DIVCA stating that,

> Although DIVCA never directly addresses intervenor compensation, we find that the plain language of the statute explicitly considers the classification of video service. DIVCA states that "video service providers are not public utilities or common carriers." "The holder of a state franchise shall not be deemed a public utility as a result of providing video service under this division." With respect to our authority to regulate video service, Public Utilities Code § 5840(a) declares that the Commission may not "impose [a] requirement" on state franchise holders other than one "expressly provided" in the Act. We interpret this statute to mean that we may not impose a regulation on a state video franchise holder unless we deem the regulation necessary for enforcement of a specific DIVCA provision.[34]

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[32] D.07-03-014, pp. 94-95 citing Rodriguez v. Solis, 1 Cal.App.4th 495, 504-505 (1991) (citing Great Western Sav. & Loan Assn. v. City of Los Angeles, 31 Cal.App.3d 403, 413 (1973)) and Lazan v. County of Riverside, 140 Cal.App.4th 453, 460 (2006).

[33] P.U. Code § 1801.3(b).

[34] D.07-03-014, citing P.U. Code §§ 5810(a)(3); 5820(c); and 6840(a).

TURN submits that these arguments are irrelevant. The fact that § 5840(a) prohibits the Commission from imposing "any requirement on any holder of a state franchise except as expressly provided in this division," is immaterial since the intervenor compensation requirement is imposed by statute, not by the Commission. The Legislature could have, but did not, include the intervenor compensation statutes in the list of statutes specified in that section to not apply to holders of a state franchise. The reasonable conclusion is that the statutes omitted from that list do apply. The Decision's arguments are further diminished since § 5810(a)(2)(G) explicitly establishes the principle that the legislation should "maintain all existing authority of the [Commission] as established in state and federal statute."

The Decision's conclusion that DIVCA "does not permit" intervenor compensation suggests that the Legislature intended to eliminate intervenor compensation even as it excluded the associated statutes from the list of those that do not apply to holders of a state franchise, and explicitly maintained all other statutory authority. The far more logical and only legally defensible reading is 1) DIVCA does not address, much less prohibit, the granting of intervenor compensation, and 2) the intervenor compensation statutes direct an award of compensation if the participation occurs in a "proceeding" and the other eligibility requirements are met. And, it is beyond this Commission's authority to rewrite legislation, no matter how much such a rewrite might better comport with an outcome the Commission desires.[35]

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[35] See, Witkin Summary of California Law, Tenth Edition Copyright (c) 2006, 7 Witkin Sum. Cal. Law Const Law § 120, discussing *Unzueta v. Ocean View School Dist.* (1992) 6 C.A.4th 1689, 8 C.R.2d 614, ""[E]xcept in the most extreme cases where legislative intent and the underlying purpose are at odds with the plain language of the statute, an appellate court should exercise judicial restraint, stay its hand, and refrain from rewriting a statute to find an intent not expressed by the Legislature." (6 C.A.4th 1700.) If this applies to an appellate court, it should obviously be applicable to the Commission as well.

Finally, D.07-03-014 argues that §1807 provides that intervenor compensation is available only when it is a "proceeding involving utilities."[36] But the language in that section merely addresses the payment obligation that arises where the subject of the Commission proceeding is a public utility. It would stretch that language beyond the breaking point to interpret it as somehow directing that "proceedings" must be limited to those "involving utilities" when the definition of "proceedings" set forth a few sections prior does not include any such limitation. At most, §1807 suggests the Commission may need to rely upon the Intervenor Compensation Fund where the DIVCA-related application or proceeding does not involve a regulated utility, just as has been done under similar circumstances in the past.[37] Utilizing the Intervenor Compensation Fund would also deal with the concern raised by Verizon and echoed by the Commission that "state video franchise holders that also are telephone companies should not be subject to intervenor compensation obligations if other state video franchise holders are not subject to the same requirements."[38] There is nothing prohibiting all video franchisees from paying into that Fund and then using the Fund to award intervenor compensation for DIVCA-related proceedings.

As D.07-03-014 is written, the Commission has frozen-out all interested party involvement in any prospective proceedings concerning DIVCA-related issues. There is nothing in DIVCA or the intervenor compensation statutes that would permit this result,

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[36] D.07-03-014, p. 208.

[37] The Commission has found ways to ensure the fundamental objectives of the intervenor compensation program have been met even where a public utility was not a party(for example, see D.02-05-029 where the Commission awarded intervenor compensation from the "Advocates Trust Fund" in a case involving mobile home parks and sub-metering).

[38] D.07-03-014, p. 210.

especially given the Commission's consistent findings that customers should be encouraged to participate in Commission proceedings.[39]

V. CONCLUSION

For the reasons stated above, TURN requests its application for rehearing be granted.

April 4, 2007

Respectfully submitted,

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[39] See, for example, D.04-10-012, 2004 Cal. PUC LEXIS 492,*10 (citing with approval the Court of Appeals statement that "[In enacting] the provisions [of the Intervenor Compensation statute], the Legislature sought to encourage customers to participate [*13] in PUC proceedings and contribute to PUC decisions. Southern Cal. Edison v. CPUC, 117 Cal. App. 4<th> 1039, 1049 (2004)); and D.06-11-010, 2006 Cal. PUC LEXIS 488,*5 (citing with approval D.02-08-061 where the Commission stated that "We value the continued participation of intervenors."

CERTIFICATE OF SERVICE

I, Larry Wong, certify under penalty of perjury under the laws of the State of California that the following is true and correct:

On November 5, 2007 I served the attached:

APPLICATION FOR REHEARING OF D.07-10-013 BY THE UTILITY REFORM NETWORK

on all eligible parties on the attached lists to **R.06-10-005**, by sending said document by electronic mail to each of the parties via electronic mail, as reflected on the attached Service List.

Executed this November 5, 2007, at San Francisco, California.

____/S/_____

Larry Wong

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